FILE COPY

No. 101

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952. No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Lawyers' Brief Publishing Co., 4th Street Bldg., Philadelphia, Pa.

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Court of Appeals thereon is contrary to and in conflict with the decisions of this Court, other Federal courts, the settled weight of authority in the state courts, and the Restatement of Conflict of Laws.

2. The decision of the Circuit Court of Appeals that the question whether a tort action survives the tortfeasor's death is not one of substance, is contrary to and in conflict with the decisions of this Court and of the Circuit Court of Appeals for the Second Circuit.

3. The refusal of the Circuit Court of Appeals to recognize the petitioners' substantive defense under the applicable law of New York is contrary to and in conflict with the decisions of this Court and the weight of authority.

4. The decision of the Circuit Court of Appeals that the right of respondent to recover damages in this action and the validity of petitioners' defense thereto, are governed by the law of the forum and not the lex loci delicti, is contrary to and in conflict with decisions of the Circuit Courts of Appeals for the Second, Fourth, Sixth, Eighth and Ninth Circuits, and the Court of Appeals of the District of Columbia, and an earlier decision of the Circuit Court of Appeals for the Third Circuit.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the United States Circuit Court of Appeals for the Third Circuit to certify and to send to this Court a full and complete transcript of the Record and of all proceedings had in the case numbered and entitled on its docket No. 4864, March Term, 1932, Louise Chase by Jesse Blythe, Prochein Ami, and Louise Chase, in her own right, Plain-

tiff-Appellant v. Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased, Defendants-Appellees, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the judgment therein of said Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

LAURA ORMSBY,
B. RUSH FIELD,
Executors of the Estate of Frank G. Ormsby, deceased,
Petitioners,

By
ROBERT T. MCCRACKEN,
Attorney for Petitioners.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 10-13) was not officially reported. It was filed on September 24, 1931.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 17-24) has not yet been officially reported. It was filed on April 7, 1933.

II. JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (USCA, sec. 347).

2. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed is April 7, 1933 (R. 24).

3. The following cases sustain the jurisdiction of this Court:

Cuba R. R. Co. v. Crosby (1912), 222 U. S. 473;
Slater v. Mexican National R. R. Co. (1904), 194 U. S. 120;
Forsyth v. Hammond (1897), 166 U. S. 506, 513-514;
Spiller v. Atchison, Topeka & Santa Fe Rwy. (1920), 253 U. S. 117.

III. STATEMENT OF THE CASE.

This has already been stated under heading I in the petition, and said statement, in the interest of brevity, is hereby adopted and made a part of this brief.

IV. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, and in awarding a venire facias de novo.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum (Pennsylvania), governed the question whether the respondent's right of action survived the tortfeasor's death, and that the lex loci delicti (New York) did not.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum gave the respondent a right to maintain the present action although under the lex loci delicti no such right existed when suit was instituted.

4. The Circuit Court of Appeals for the Third Circuit erred in not applying the principles clearly laid down in prior decisions of this Court as well as in its own decisions, and in the decisions of other Circuit Courts of Appeal.

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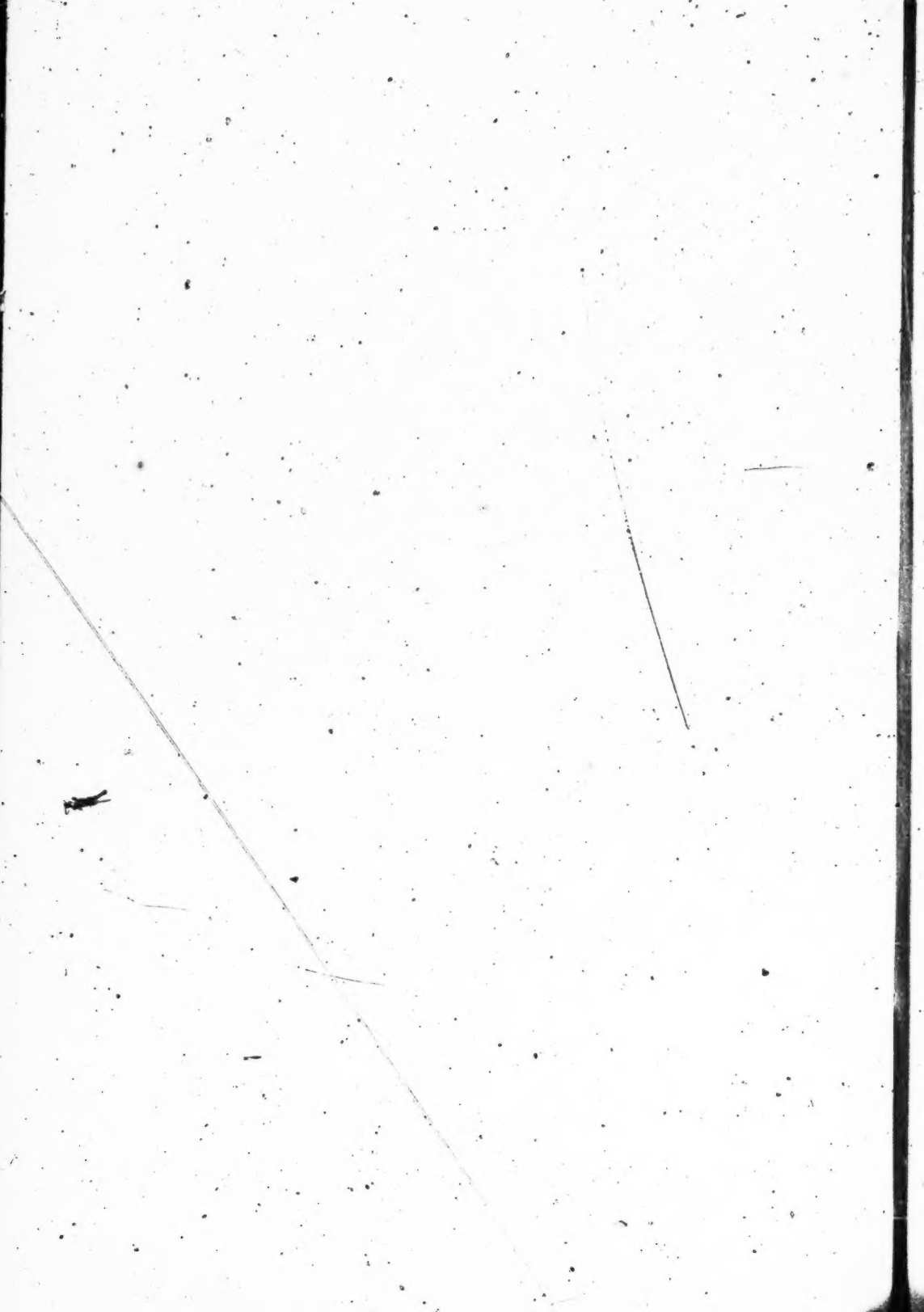

IN THE

Supreme Court of the United States

October Term, 1932 No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased, respectfully shows to this Honorable Court:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action in trespass to recover damages for personal injuries received by respondent in New York

City, New York, on October 17, 1925, when a passenger elevator in which she was riding crashed to the basement because of the alleged negligence of Frank G. Ormsby, the owner of the building (R. 2, 3, 8). On June 14, 1926, Ormsby died (R. 2, 9). The respondent did not institute any suit for damages during Ormsby's lifetime (R. 7). Under the law of New York, her cause of action abated with Ormsby's death (R. 10, 19). On April 12, 1927, the present action was instituted against the petitioners, as executors of Ormsby's estate, in the United States District Court for the Eastern District of Pennsylvania (R. 1). Under the statutory law of Pennsylvania an action for damages for personal injuries can be maintained against the estate of a deceased tortfeasor (R. 18, 19).

In their affidavit of defense, petitioners pleaded that respondent's cause of action had abated with Ormsby's death (R. 6, 7). The District Court held that the extent of respondent's rights was to be determined by the substantive law of New York, where the injuries were received, and entered a judgment of non suit for the reason that respondent had no cause of action under the law of New York at the time suit was instituted (R. 10-13, 16).

On appeal to the Circuit Court of Appeals for the Third Circuit, that court reversed the judgment and held that the question whether respondent's cause of action survived Ormsby's death was to be determined under the survival statute of Pennsylvania, in which State the suit was instituted (R. 17-24).

II. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. What law determines the survivability of a tort action for personal injuries is an important question of conflict of laws, and the decision of the Circuit

or the tortfeasor. *Actio personalis moritur cum persona.* Survival of such a right of action is dependent solely upon statute, and such statutes create a greater right than that known to the common law. It necessarily follows that the question of survivability is not one of procedure but is a matter of substance because it definitely bears upon the extent of the right of action given to the respondent under the law of New York. Indeed, in its opinion the Circuit Court of Appeals says: "All the authorities agree that survivability of a cause of action is * * * not a question of procedure." (R. 19). If survivability is not a question of procedure it must be a matter of substance, and this Court has so held.

In *Schreiber v. Sharpless* (1884), 110 U. S. 76, 80, this Court speaking by Chief Justice WAITE, said: "Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." In *Michigan Central R. R. v. Vreeland* (1913), 227 U. S. 59, 67, this Court speaking by Justice LURTON, said: "The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action'."

The Circuit Court of Appeals for the Second Circuit has taken the same view: *Sullivan v. Associated Bill-Posters* (1925) 6 F. (2), 1000, 1008.

As the question of survivability is one of substance, if, like all other matters of substance, is determined by the lex loci delicti. The *Restatement of Conflict of Laws (Proposed Final Draft No. 3)*, provides:

> **"Section 426. SURVIVAL OF ACTIONS.**
>
> **Whether a claim for damages for a wrong survives the death of the wrongdoer or of the injured person is determined by the law of the place of wrong."**

Among the authorities in support of this statement

are: *Davis v. R. R.* (1887), 143 Mass. 301; *O'Reilly v. R. R.* (1889), 16 R. I. 388; *Needham v. Railway* (1865), 38 Vt. 294; *State v. R. R.* (1876), 45 Md. 41; *Hyde v. Railway* (1883), 61 Ia. 441. *Cf. Buckeye v. Buckeye* (1931), 203 Wis. 248.

The Restatement is also supported by *Orr v. Thorn* (1928), 107 Conn. 174, which on its facts is identical with the case at bar, and in which the court held that the plaintiff could not recover.

It is conceded that under the law of New York the respondent had no right of action after Ormsby's death (R. 19). Thus the question of survival involves the question of the extent of the right originally given to the respondent by the New York law. Cases involving actions under death statutes furnish pertinent analogies. The problem is to determine the extent of this new statutory right and it is universally held that the time fixed by such a statute within which suit must be instituted is a limitation on the extent of the right, and after the time limit expires there is no right of action and no suit can be maintained anywhere: *The Harrisburg* (1886) 119 U. S. 199, 214; *Wigan v. New York, &c. R. R.* (1931), 283 U. S. 53; *Goodrich on Conflict of Laws*, 170, 174.

The same view has been taken with regard to the Hepburn Amendment which creates a right to recover a freight overcharge provided a complaint is filed within two years from the time the cause of action accrues: *Phillips v. Grand Trunk Ry.* (1915), 236 U. S. 662.

In the case at bar the law of New York gave the respondent a right to recover damages from Ormsby during his lifetime. The "during his lifetime" was a limitation on the extent of the substantive right, just as the period of limitation in a death statute, and when Ormsby died the respondent's right of action was completely extinguished, and there was nothing left on which she could maintain an action anywhere. We submit that the decision

of the Circuit Court of Appeals to the contrary is bad law on an important question of conflict of laws, and is in conflict with the court's own statement that, "substantive rights are determined by the law of the place where the tort was committed * * *" (R. 18). The Circuit Court of Appeals does not cite one pertinent decision in support of its conclusion. The cases upon which it relies all deal with the separate problem of reviving a suit after the death of a party. In such case the forum will follow its own revival statute. When that situation is presented, inasmuch as the plaintiff did have an existing right of action when suit was first instituted, over which the forum assumed jurisdiction, the local procedure will be followed in raising that right of action to a judgment. The distinction between the two problems is discussed at length in *Orr v. Ahern* (1928), 107 Conn. 174, 176 178. The problem of what law governs revival of a pending action is quite different from the problem of what law governs the survival of a right of action on which no suit has been instituted.

We submit that inasmuch as the decision of the Circuit Court of Appeals is a binding authority on the district courts of Pennsylvania, New Jersey and Delaware and is likely to cause confusion in other Circuits in this field of law, it should not be permitted to stand unreversed by this Court.

POINT C.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

The Circuit Court of Appeals held that whether the respondent's right of action survived Ormsby's death was to be determined under the survival statute of the forum and not by the law of New York where respondent was injured.

This is contra to and in conflict with the decision of the Sixth Circuit in *Sanders' v. Louisville & N. R. Co.* (1901), 111 Fed. 708, which was decided by then Judge Lurton. As stated in the syllabus the court held: "The question whether a cause of action created by a state statute survives the death of the plaintiff, or of the person for whose benefit it is given, is one of right, and not of procedure, and is governed by the statutes of the state giving such right of action."

It is also contra to and in conflict with the decision of the Second Circuit in *U. S. &c. v. Greenwald* (1927), 16 F. (2) 948, 950.

We submit that the decision of the Circuit Court of Appeals is also in conflict with the decisions of this Court, already referred to, which hold that survival is a question of substance and that all such questions must be determined by the lex loci.

Under the law of New York the respondent has no right of action and the petitioners are under no liability to her. In reversing the judgment of non suit the Circuit Court of Appeals is necessarily deciding that the law of New York does not and the law of the forum does govern the question of the respondent's right and the petitioners' liability. This is contrary to and in conflict with many decisions of this Court and other Circuits, including the following:

Heredia v. Davies (1926), 12 F. (2) 500, C. C. A. 4, holding that the right to maintain the action is governed by the lex loci.

The Hanna Nielsen (1921), 273 Fed. 171, cert. den. 257 U. S. 653, C. C. A. 2, holding that the lex loci governs the right to recover, and it must be proved.

Sullivan v. Nitrate &c. Co. (1919), 262 Fed. 371, C. C. A. 2, holding that the law of the forum does not determine the right to recover.

V. ARGUMENT.

Summary.

Point A. It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

Point B. Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

Point C. The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

POINT A.

It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

In its opinion the Circuit Court of Appeals recognized the general principle that "substantive rights are determined by the law of the place where the tort was committed, the lex loci delicti * * *" (R. 18). The reason for this principle is that inasmuch as the right has been created by the lex loci, it is necessary to look to that law to understand the nature and extent of the right and the limitations upon it: *Dicey, Conflict of Laws* (4th Ed.) 10, 49-50; *Slater v. Mexican National R. R.* (1904), 194 U. S.

120; *Davis v. Mills* (1904), 194 U. S. 451, 454; *Spokane, &c. R. R. v. Whitley* (1915), 237 U. S. 487; *Western Union Telegraph Co. v. Brown* (1914), 234 U. S. 542.

The nature and extent of a common law right of action for personal injuries may be stated somewhat as follows: One who is himself free from contributory negligence and has not voluntarily assumed the risk is entitled to recovery, during the lifetime of both parties, damages for personal injuries proximately caused by the actor's wilful, reckless, or negligent misconduct. The requirements that the one injured be free from contributory negligence, from voluntary assumption of risk, and that the recovery be obtained during the lifetime of both the injured person and the tortfeasor, all deal with the substantive question of how extensive is the right which has been given and what limitations have been imposed upon it. All these questions are governed by the lex loci.

In *Slater v. Mexican National R. R.* (1904), 194 U. S. 120, 126, this Court, speaking by Mr. Justice Holmes, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, Smith v. Condry, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, **and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.** * * * Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

In *Davis v. Mills* (1904), 194 U. S. 451, 454, this Court again speaking by Mr. Justice Holmes, said:

> "But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater v. Mexican National Railroad, 194 U. S. 120."

In *Cuba R. R. Co. v. Crosby* (1912), 222 U. S. 473, 478 479, this Court, again speaking by Mr. Justice Holmes, said:

> "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. Slater v. Mexican National R. R. Co., 194 U. S. 120, 126. **The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there.** With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. See Bean v. Morris, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights. • • •
>
> We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. **The right to recover stands upon that as its necessary foundation.** It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

Therefore a plaintiff must show that at the moment of his coming into court he possesses a then existing right of action under the lex loci: *Dicey, Conflict of Laws* (4th Ed.), 22. All that the forum can do is to give extra-territorial jurisdiction to enforce an existing right of action. *Dicey*, supra, p. 10. If, when the plaintiff comes into court, he has no right of action under the lex loci, the forum cannot look to its own law to create a right of action for him. So firmly is this principle engrained that this court has recently held that the refusal of the forum to give effect to a substantive defense under the applicable law of another state subjects the defendant to irremediable damage, is reversible error, and where the defense arises under a statute, the refusal to recognize such defense is a violation of the full faith and credit clause of the Federal Constitution: *Bradford Electric Light Co. v. Clapper* (1932), 286 U. S. 145, 160.

Yet that is exactly what the Circuit Court of Appeals has done in the present case, only here the defense arises under the common law and not under a statute. We submit that the decision in this case is wholly in conflict with the whole theory of conflict of laws which is that the forum will, within certain limits, give a remedy to one who comes to it with an existing right of action, which has been created elsewhere, but that the forum cannot create a right of action for him.

POINT B.

Whether a right of action survives the death of a tort-feasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

At common law a right of action for personal injuries ceases to exist upon the death of either the one injured

Rubenstein v. Williams (1932), 61 F. (2) 575, Ct. of A. D. C., holding that the right to recover is governed by the lex loci and not by the lex fori.

Mosby v. Manhattan (1931), 52 F. (2) 364, 368, cert. den. 284 U. S. 677; C. C. A. 8, holding that the lex loci governs all questions of defenses.

The Scotland (1881), 105 U. S. 24, 29, holding that the liabilities of the parties to an action are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. Accord: *Jarrett v. Wabash* (1932), 57 F. (2) 669, 671, cert. den., 287 U. S. 627, C. C. A. 2.

The Eagle Point (1906), 142 Fed. 453, cert. den., 201 U. S. 644, C. C. A. 3, holding that a rule which limits liability deals with substance and not with procedure.

Atchison, &c. Ruy. v. Spencer (1927), 20 F. (2) 714, C. C. A. 9, holding that the question of the effect of contributory negligence is governed by the lex loci. Accord: *Long v. R. R.* (1916), 238 Fed. 919, C. C. A. 4.

Wood v. Compagnie (1930), 43 F. (2), 941, 942, C. C. A. 2, saying that a limitation on a right of action is observed everywhere.

Bell v. Wabash (1932), 58 F. (2) 569, 572, C. C. A. 8, holding that a state statute cannot recreate a right given under a Federal statute that has ceased to exist by the very terms of the statute because the liability itself is destroyed.

None of the foregoing cases involve the identical factual situation presented in the case at bar. But they all deal with the extent of and the limitations on a plaintiff's right of action, and they all hold that such questions are governed by the lex loci. In the present case the New York law gave the respondent a right of action with the limitation that it must be asserted by suit and a recovery had during the lifetime of Ormsby. We submit, therefore, that the Circuit Court of Appeals in the case at bar in

holding that this limitation did not control but that the law of the forum determined the extent of and the limitations upon respondent's right of action, has held contra to and in conflict with the decisions of this Court and of the other Circuits whose decisions have been cited.

VI. CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Circuit Court of Appeals may be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit, and finally reverse it.

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